Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

88-112

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DAVID MCDOWELL and DONNA F. MCDOWELL,
Petitioners,

vs.

CREDIT BUREAUS OF SOUTHEAST MISSOURI, INC.,
Respondent.

On Appeal from the Missouri Supreme Court

PETITION FOR WRIT OF CERTIORARI

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OLIVER, OLIVER, WALTZ &
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5-7

QUESTIONS PRESENTED

A.

This Petition for Certiorari presents the issue of whether 15 U.S.C., Section 1681(e), sub(n), sub(o), and sub(t), the Fair Credit Reporting Act, supplanted the law of the State of Missouri as respects the common law tort of defamation, and thereby preempted the state law grant of a First Amendment based "qualified privilege" to a credit reporting agency immunizing credit reporting performed in reckless disregard of the accuracy of the information contained in that report.

B.

Whether or not the Supreme Court of the State of Missouri in affirming the decision of the trial court to deny the giving of Instructions B and/or C extended the protection of the First Amendment of the Constitution of the United States beyond the limits established by this Court in *Dun & Bradstreet v. Greenmoss Builders,* 472 U.S. 749, 86 L.Ed.2d 593, 105 S.Ct. 2939 (1985) and thereby determined, in contravention of this Court's opinion, that the commercial enterprise of credit reporting for hire was entitled to First Amendment protection even though that credit reporting was made in utter disregard of the truth, and resulted in the publication and promulgation of a totally false and fabricated credit report.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of Missouri decided March 15, 1988, in Cause No. 69559 is reported at 747 S.W.2d 630 (Mo. en banc 1988). The decision of the Missouri Supreme Court denying rehearing is not reported, but appears in the Appendix.

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment and decision of the Supreme Court of the State of Missouri was deiivered on March 15, 1988, and the Appellants' (Petitioners here) Motion for Rehearing was denied on April 19, 1988, and copies thereof are appended to this Petition in the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment to the Constitution of the United States which states in part:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

2. Article VI, Clause 2:

> "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; . . ."

3. Portions of the Fair Credit Reporting Act, including Section 1681(e), Section 1681(n), Section 1681(o), and Section 1681(t), the full texts of which are set forth in the Appendix as attached.

STATEMENT OF THE CASE

Prior to March 26, 1982, David McDowell and Donna F. McDowell, Petitioners herein, were a moderately successful business couple owning and operating a construction and cabinet making business in the Jackson-Fruitland area of Cape Girardeau County. By 1982 this substantial business had also been involved in the development of ten residential subdivisions.

Respondent, Credit Bureau of Southeast Missouri, Inc. ("Credit Bureau") is a commercial credit reporting agency. The business of the Credit Bureau involves: (a) providing customers, for a fee, specific credit reports on a particular individual, and (b) publishing a monthly "Credit Bureau Bulletin," a publication listing, among other things, filed bankruptcies. This credit bulletin is distributed throughout the Southeast Missouri trade area to various subscribers.

In April of 1982 the McDowells sold a home in one of their subdivisions to a Gilmore. The sale was conditioned on financing by Colonial Federal Savings and Loan Association of Cape Girardeau, Missouri. In accordance with their usual procedure, among other items, Colonial Federal ordered a "credit report" on the McDowells from Credit Bureau of Southeast Missouri, Inc. Pursuant to this request, Colonial Federal received a "credit report" from the Credit Bureau. This credit report (Exh. 1 and 1-A) and the Credit Bulletin issued for the month encompassing the period March 26, 1982, both contained false and, in fact, fabricated information with respect to the McDowells. This false information stated that the McDowells had filed bankruptcy.

The explanation for the false report is as follows: On March 26, 1982, an employee of the Credit Bureau began to post bankruptcy filings to credit records. On that day that employee, Tina Warff, found a bankruptcy filing for on "Donna R. McDowell, Rt. 2, Box 298, Jackson, Missouri, Seamstress." The McDowells were subsequently mistaken for this Donna R. McDowell. This resulted because the employee: (a) did not compare middle names, (b) did not compare spousal names, (c) did not compare route numbers, (d) did not compare social security numbers, (e) did not compare occupations, (f) did not compare marital status, (g) did not compare sex, and (h) did not compare credit bureau affiliations. Had any one or more of these comparisons been made the employee would have discovered that Donna R. McDowell, Rt. 2, is not Donna F. McDowell, Petitioner herein. Nonetheless, the Credit Bureau:

1. Entered the bankruptcy as a bankruptcy for Donna F. McDowell, and

2. Compounded the error by converting that bankruptcy report to a "joint" report, thereby indicating on the records of the Credit Bureau, in the Credit Report, and in the widely disseminated Credit Bulletin, that both Petitioner, David McDowell, and Petitioner, Donna F. McDowell, had *jointly* filed bankruptcy.

At the time of the employee's failure to make the above comparisons and her unjustifiable conversion of a single into a joint bankruptcy, the Credit Bureau had actual knowledge that David and Donna F. McDowell were members of the Credit Bureau. Additionally, the Credit Bureau had, in fact, been engaged to collect an account against the Donna R. McDowell. As a direct result of this reckless disregard for the truth, and as a further proximate consequence of the Credit Bureau's "invention" of the joint bankruptcy, two results followed:

1. Colonial Federal withheld closing the loan, and

2. Word of the bankruptcy spread through the local trade community, as a result of which business associates refused to do business with the Petitioners for fear of nonpayment.

Nineteen days after the issuance of the fraudulent credit report, and approximately thirteen days after the publication of the Credit Bulletin, following repeated contacts by Colonial Federal which did not believe the report, and by counsel for the McDowells, the Credit Bureau issued a corrected credit report. The Credit Bureau never corrected the erroneous Credit Bulletin.

With the false information in the trade area, the McDowells business began to suffer. Various creditors to whom balances were due immediately filed suit to collect, and the acquisition of credit necessary to the continuation of the business became difficult. The net result was that the McDowells experienced actual damage as computed by Terry Sutton, Ph.D. in the amount of $550,695.02, or as computed by their certified public accountant, $512,291.

After sustaining this loss, Petitioners filed suit in the Circuit Court of Cape Girardeau County seeking recovery. A copy of the Second Amended Petition is appended hereto. At the trial of this cause, Petitioners submitted a "Motion and Request"

the second portion of which was to request appropriate instructions, including Instructions B, C and D. The heart of plaintiffs' claim at trial, as presented by the Instructions and as revealed by the instruction conference (Tr. 981, et seq., attached in Appendix) was the essential claim that the Fair Credit Reporting Act supplanted the preexisting state law with respect to defamation. Particularly, the Petitioners were entitled to submit against Respondent, Credit Bureau, for its violation of Section 1681(e), and recover, under Section 1681(o), their compensatory loss for the negligent noncompliance, and to obtain punitive damages under Section 1681(n) under the standard that the action of the Credit Bureau was so reckless and in utter disregard of the truth as to constitute willful noncompliance. Those claims were presented to the trial court in the Second Amended Petition and magnified by the motion filed during trial, and finally amplidied in the instruction conference (Appendix, Item No. 6) held November 20, 1985.

The trial court's response (Appendix, Item No. 5) during the instruction conference was to deny the tendered instructions and to assert that the Credit Bureau had First Amendment protection requiring the issuance of a "qualified privilege instruction" which would have required the jury to find an actual specific intent to harm Petitioners (Tr. 981). These matters were then presented by Brief and Supplemental Briefs directly to the Missouri Court of Appeals for the Eastern District. In its unreported Opinion, the Court of Appeals ignored the preemption issue, but agreed with Petitioners' contention that the Credit Bureau was not entitled to a "qualified privilege requiring finding of actual specific intent to harm" if such a qualified privilege were based upon the First Amendment to the Constitution of the United States. On transfer to the Supreme Court of Missouri, as shown by the written Opinion (Appendix, Item No. 2), the Missouri Supreme Court, as did the Missouri Court of Appeals, ignored the Supremacy Clause of the Constitution of the United States and declined to deal with the preemption

issue. The Court reversed the decision of the Court of Appeals and, contrary to Petitioners' position, held that the Credit Bureau was entitled to a qualified privilege, notwithstanding this Court's decision in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 86 L.Ed.2d 593, 105 S.Ct. 2939.

In each instance the issues presented for review by certiorari were timely presented to the trial court and ruled on, albeit improperly by the courts below.

ARGUMENT

Certiorari should be granted in this case and the decision of the Supreme Court of the State of Missouri should be reversed with directions to remand this case for retrial under the Instructions tendered by Petitioners.

By its grant of a "qualified privilege" to Respondent Credit Bureau the Court below has sanctioned the reckless invention and publication of false credit reports. This Court, however, has determined that it is not appropriate to enshrine commercial credit reporting with such a "privilege". The Court below has also ignored the preemptive nature of the Fair Credit Reporting Act, 15 U.S.C., Section 1681 et. seq.

A.

The Fair Credit Reporting Act has eliminated the "qualified privilege" with respect to negligent credit reporting and has provided for a "reckless disregard standard" for willful noncompliance. Prior to the adoption of the Fair Credit Reporting Act, Public Law No. 91-508, 84 Stat. 1114 (1974), the area of credit reporting was left to regulation of the states. Missouri, as with other states, applied a First Amendment based qualified privilege to credit reporting agencies thereby affording substantive protection against false, inaccurate, or misleading credit reporting. Missouri had approved such a privilege in *Estes v. Laughton-Byrne-Bruner Insurance Agency Co.*, 437 S.W.2d 685 (Mo.App. 1969); *Mitchell v. Bradstreet Co.*, 22 S.W. 358, 360 (Mo. 1983). As illustrated by the Missouri Supreme Court's Opinion below, it was necessary for the plaintiff to prove malice in fact, which is to say proof that the defendant was actuated by specific ill-will and had an actual intent to harm the plaintiff. Those First Amendment based common law principles were traditionally utilized in Missouri before 1970 and are reflected in Missouri approved Instruction No. 23.06(2), which in general follows an actual malice standard. As pointed out by the Missouri Supreme Court Committee Comment on the Instruction:

> "Paragraph Second and Third in M.A.I. 23.06(2) reflects the actual malice requirement of *New York Times* as the test was further articulated in *St. Amant v. Thompson*, 390 U.S. 727, 20 L.Ed2d 262, 88 S.Ct. 1323 (1968). The Missouri courts have applied the New York Times test on a number of accasions."

Thus, the Committee Comments to the Instruction (adopted by the Missouri Supreme Court as a part of its promulgation of the Instruction) make it clear that the Missouri courts continue to apply the *New York Times* standard to a private plaintiff's defamation action.

In 1970, the Fair Credit Reporting Act was adopted by Congress after six years of effort. One of the goals of that act was to increase accuracy in credit reports, and to that aim the act requires the agency to create, maintain, and follow procedures which are intended to insure accuracy (Section 1681(e)(b)). The Act specifically requires that the reporting agency:

> ". . . shall follow reasonable procedure to assure maximum possible accuracy of the information concerning the individual about whom the report relates." Section 1681 (e)(b).

The Act then establishes two remedies.

1. For a negligent failure to comply, there is liability for actual damage and attorney's fees (Section 1681(o)).

2. For "willful failure" to comply there is liability for actual damage, attorney's fees, and such punitive damages as the Court may allow (Section 1681(n). The Act does not define what constitutes a "willful failure to comply."

This Act, effective in 1971, also provides in Section 1681(t) as follows:

> "This subchapter does nor annul, alter, affect, or except any persons subject to the provisions of this subchapter

from complying with the laws of the state with respect to the collection, distribution, or use of any information on a consumer *except* to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency." (emphasis added)

It is generally conceded by scholars and practitioners alike, and by the few appellate courts who have had occasion to deal with this subject that with respect to what was a common law action for defamation, the Fair Credit Reporting Act has preempted state law. See *Maurer*, "Common Law Defamation and the Fair Credit Reporting Act," 72 Ga. Law Journal, 95 (1983); *Blair and Mower*, "State Law and Common Law: The Fair Credit Reporting Act,"49 Mo. Law Review, 289 at 291 and 306.

It is clear that under the legislative intent as expressed in Section 1681(t) Congress supplanted state law tort actions, and provided a new two-faceted tort, to-wit, a negligence tort under Section 1681(o) and further provided for the recovery of punitive damages for willful violations under Section 1681(n). This preemption has been recognized in *Thornton v. Equifax, Inc.*, 619 F.2d 700 (8th Cir. 1980) and *Sunward Corp. v. Dun & Bradstreet*, 811 F.2d 511 (10th Cir. 1987).

In accordance with that preemption, Petitioners below offered in the form of Instructions B, C, and D, Instructions tailored to permit the jury to award actual damage for the negligent failure to comply with the act, and to award punitive damages under the standards established by the act. As pointed out in *Sunward Corp., supra*, at 533, it is appropriate that the *New York Times v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964) definition of malice be applied under the act to define "willful failure." To overcome privilege under the First Amendment, the plaintiffs need only prove the credit agency acted with reckless disregard as to whether or not the report was false.

In this instance, it is absolutely clear from the testimony of the Credit Bureau emloyee alone that the McDowells were victims of a consumer report which falsely and viciously stated that they had filed bankruptcy. This was a credit report that was generated and widely promulgated without any regard to its accuracy; without the use of any procedure to check its viability and, in fact, was a credit report which was simply invented by the employee in utter disregard of the truth.

That showing alone entitled Petitioners to a negligence instruction allowing the jury to return a verdict for failure to comply with the reasonable procedures section of the Fair Credit Reporting Act, and awarding actual damage which in this case is between $512,000 and $550,000.

By ignoring the effect of the Fair Credit Reporting Act upon the laws of Missouri, the Supreme Court of the State of Missouri has utterly disregarded the supremacy clause of the Constitution of the United States. That Act, as noted in 1681(t) provides for preemption where there is an inconsistency. As illustrated by the Opinion below, Missouri does not purport to have a negligence based common law action for defamation. The common law of the State of Missouri is, therefore, by definition inconsistent with the provisions of the Fair Credit Reporting Act.

As illustrated by the Opinion below, the Missouri Supreme Court further required an actual malice standard for any recovery, including a recovery for punitive damages. Here again, this disregards the intent of Congress which was to provide a "reckless disregard" type standard for punitive damages. This Court should issue its Writ of Certiorari to correct this error and, more importantly, to provide guidance to the states as to the preemptive effect of the Fair Credit Reporting Act in order to carry out the legislative intent of the Congress of the United States, and to prevent repeated miscarriages of justice.

B.

As a further bases for the issuance of its Writ, this Court should provide guidance as to the effect of its holding in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 86 L.Ed.2d 593, 105 S.Ct. 2939. Believing, as did the Missouri Court of Appeals for the Eastern District, that the plurality decision in *Dun & Bradstreet* determined that a private individual did not need to show "actual malice" in order to recover either actual or punitive damages where the matter reported involved: (a) a commercial speech, and (b) a credit report of only private concern, Petitioners below tendered Instructions B, C and D which were refused by the trial court. By that refusal and with its affirmation by the Supreme Court of Missouri, Petitioners believed that Missouri has inappropriately interpreted this Court's decision and have thereby granted First Amendment protection to a "commercial enterprise for hire." The facts of this case clearly illustrate the inappropriateness of extending First Amendment protection to the Credit Bureau.

The injurious conduct which damaged Petitioners manifested itself in three ways:

1. By the publication of a recklessly false credit report to Colonial Federal.

2. By the publication of that same information in a credit bulletin.

3. By failure to timely correct those errors.

The report/bulletin were clearly disseminated only to commercial subscribers, "a pay audience," of the Credit Bureau. However, it is equally clear that such information in print form was available and seen by nonsubscribers with devastating results insofar as Petitioners are concerned. As illustrated in *Dun & Bradstreet, supra*, at 762:

> "This particular interest warrants no special protection when — as in this case — the speech is wholly false and clearly damaging to the victim's business reputation."

Thus, the "speech" involved is not entitled to First Amendment protection.

This 1985 definitive decision was never reflected in the law of Missouri. That law was, by contrast, contained in Missouri Approved Instruction 23.06(1) and 23.06(2). Those Instructions promulgated by the Missouri Supreme Court contain the following comment issued in 1983, to-wit:

> "The federal decisions balancing the federal First Amendment protections of free speech and freedom of the press against the state's interest in protecting citizens from defamation have produced standards of law which are imposed upon the states by the federal constitution . . . *Gertz* also prohibits liability without a finding of actual damages. Missouri Approved Instruction M.A.I. 23.06(1), Committee Comment at Page 313.

The obvious difficulty with the burden imposed upon Petitioners by the state of Missouri is that it misinterpreted *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974) and failed to heed at all the teachings of *Dun & Bradstreet v. Greenmoss, supra. Dun & Bradstreet v. Greenmoss* totally eliminated the necessity of "actual malice" and clearly established that there could be presumed actual and punitive damages without actual malice. Such a standard is consistent with the First Amendment in a credit report situation. Missouri Approved Instructions and the interpretation of the law by the Supreme Court simply did not "keep up."

The Instructions given patterned after 23.06(1) and (2) and M.A.I. 4.15 are simply not viable and are, in fact, constitutionaly infirm. *Hoemeke and Martineau*, "The First Amendment and Defamation," 33 St. Louis Bar Journal, 5 (1987).

Historically in Missouri, as illustrated by *Mintor v. Bradstreet Co.*, 174 Mo. 444, 73 S.W. 668 (Mo. 1903), Missouri recognized a "qaulified privilege," but couched the standard necessary to overcome that privilege as:

> "Not in good faith, but with intent to injure plaintiffs, *or* with willful and wanton neglect of the rights and interests of the plaintiff." *supra*, at 676.

That traditional standard which is consistent with the Fair Credit Reporting Act standard was, however, twisted as a result of the Court's interpretation of *New York Times*, and *Gertz, supra*. The Missouri Supreme Court, at least, took the position following *New York Times* and *Gertz*, that there must be actual malice, in fact, to overcome the privilege. See e.g. *Carter v. Willard Home Products, Inc.*, 714 S.W.2d 506, 513 (Mo. banc 1986). Thus, the Missouri Appellate Courts by the application of First Amendment standards enunciated by this Court in *New York Times* and *Gertz* took a qualified privilege which could be overcome by proof of "such recklessness or carelessness on the part of the defendant as is equivalent to an actual intent to violate the rights of others," and required the impossible burden of an "actual intent to injure."

Since this Court's holding in *Dun & Bradstreet v. Greenmoss*, it is clear that the actual malice requirement added as a result of the Missouri Court's interpretation of the First Amendment to the United States Constitution is wholly inappropriate.

Absent intervention by this Court, its decision with respect to the First Amendment are substantially at risk of misapplication, and thousands of other innocent victims of recklessly produced credit reports stand to go without compensation, absent additional guidance by this Court.

The Actual Malice Standard of *New York Times* and *Gertz* is simply not applicable and this Court should not permit the continued erroneous application of the First Amendment. To do

otherwise will create a privileged class for credit agencies in contravention to the Equal Protection Clause of the Constitution of the United States. A credit bureau which recklessly produces false credit reports which, in fact, cause injury, should not be given elevated or protected status on First Amendment grounds.

CONCLUSION

Because the Trial Court and the Missouri Supreme Court ignored the preemptive affect of the Fair Credit Reporting Act, and erroneously created a protective class of speech, to-wit, Commercial Credit Report speech for hire, this Court should issue its Writ of Certiorari and correct these errors so that the Petitioners below and thousands of victims of similar reports in the future will be able to fairly seek compensation for the devastation done to them — all in accordance with the intent of Congress and the Equal Protection Clause of the United States Constitution.

Respectfully submitted,

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& COOK PC
400 Broadway, P.O. Box 559
Cape Girardeau, MO 63701
Telephone: 314-335-8278

By _____
John L. Oliver, Jr. #20334
Attorney for Petitioners

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

DAVID McDOWELL and DONNA F. McDOWELL,

Petitioners,

v.

CREDIT BUREAUS OF SOUTHEAST MISSOURI, INC.,

Respondent.

PROOF OF MAILING — AFFIDAVIT

STATE OF MISSOURI)
)ss.
COUNTY OF CAPE GIRARDEAU)

I, John L. Oliver, Jr., attorney for Petitioners, David McDowell and Donna F. McDowell, herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ of July, 1988, I deposited in the United States Post Office located at Cape Girardeau, Missouri, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court within the time allowed for filing, the foregoing Petition for Certiorari.

_____

John L. Oliver, Jr., #20334

Subscribed and sworn to before me this ____ day of July, 1988.

_____

Notary Public
My term expires:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

David McDowell and Donna F. McDowell,
Petitioners,

v.

Credit Bureaus of Southeast Missouri, Inc.,
Respondent.

PROOF OF SERVICE - AFFIDAVIT

STATE OF MISSOURI)
)ss.
COUNTY OF CAPE GIRARDEAU)

I, John L. Oliver, Jr., one of the attorneys David McDowell and Donna F. McDowell, petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of July, 1988, I served three copies of the foregoing Petition for Certiorari on Credit Bureaus of Southeast Missouri, Respondent herein, by delivering same to David M. Remley, Esquire, in the offices of Thomasson, Dickerson, Gilbert, and Cook, counsel of record for said Respondent, located at 715 North Clark, Cape Girardeau, Missouri 63701.

John L. Oliver, Jr., #20334

Subscribed and sworn to before me this ____ day of July, 1988.

Notary Public
My term expires:

APPENDIX

APPENDIX

CLERK OF THE SUPREME COURT
State of Missouri
Post Office Box 150
Jefferson City, Missouri
65102

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

April 19, 1988

Mr. Scott E. Walter
P. O. Box 270
Jackson, MO 63755

In re: David McDowell and Donna McDowell vs. Credit Bureaus of Southeast Missouri, Inc., a corporation, No. 69559

Dear Mr. Walter:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Apps. motion for rehearing overruled."

Very truly yours,

/s/ Thomas Simon
Clerk

cc: Mr. David M. Remley
Mr. James C. Swearengen
Mr. Robert Hoemeke

CLERK OF THE SUPREME COURT
State of Missouri
Post Office Box 150
Jefferson City, Missouri
65102

March 15, 1988

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

Mr. Kenneth Waldron
Mr. Scott E. Walter
P.O. Box 270
Jackson, Missouri 63755

Mr. David M. Remley
P.O. Box 1180
Cape Girardeau, Missouri 63701

Re: David McDowell, et al. vs. Credit Bureau of Southeast Missouri, Inc., No. 69559

Gentlemen:

This is to advise that the Court this day handed down the opinion attached herewith in the above-entitled cause.

Motions for rehearing must be filed within 15 days from this date (Rule 84.17). The provisions of rule 44.01)e) do not apply to extend the time for filing motions for rehearing.

Yours very truly,

THOMAS F. SIMON

/s/ Mary Elizabeth McHaney
Deputy Clerk, Court en Banc

Attachment

cc: Mr. Robert B. Hoemeke
Mr. James C. Swearengen

SUPREME COURT OF MISSOURI
EN BANC

No. 69559

David McDowell, et al.,
Appellants,

v.

Credit Bureaus of Southeast Missouri, Inc.,
a corporation,
Respondent.

APPEAL FROM THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY

Honorable A. J. Seier, Judge

Appellants appeal from a judgment entered upon a jury verdict by the Circuit Court of Cape Girardeau County in favor of respondent upon a petition which alleged that a credit report issued by respondent contained a false statement that the appellants had filed for bankruptcy.

The Court of Appeals, Eastern District, reversed the judgment but because of the importance of the issues and for the purpose of reexamining existing law and the MAI 3d instructions, transferred the cause to the Supreme Court pursuant to Mo. Const. art. V, § 10. Our review is the same as if on original appeal.

I

Appellants claimed that a credit report prepared and issued by respondent credit reporting agency to a customer was libelous because it falsely reported that appellants had filed for bankruptcy. Respondent issued the credit report to a financial institution for purposes of determining if appellants, who operated a home construction business, could convey good title

to a house. Appellants offered the following jury instructions relating to the credit report.

INSTRUCTION NO. B

Your verdict must be for plaintiffs if you believe:

First, defendant published a credit report containing the statement that plaintiffs had jointly filed bankruptcy, and

Second, such statement tended to deprive the plaintiffs of the benefit of public confidence and social associations, and

Third, such statement was read by Ken Hayden and also read and heard by other creditors, suppliers, business associates and acquaintances of plaintiffs', and

Fourth, plaintiffs' reputation was thereby damaged.

Paterned after MAI 23.06(1)
Offered by Plaintiffs
McDowell v. Credit Bureaus
Also patterned after
Dun & Bradstreet, Inc., v.
Greenmoss Builders, Inc.
53 LW 4866 (1985); ____ U.S.S.Ct. ____ (1985)
(Verdict Director)

INSTRUCTION NO. C

Your verdict must be for plaintiff if you believe:

First, defendant published a credit report and/or credit bulletins containing the statement plaintiffs were bankrupt, and

Second, Defendant was at fault in publishing such statement, and

Third, such statement tended to deprive the plaintiff of the benefit of public confidence and social associations, and

Fourth, such statement was read by members of the public, and

Fifth, Plaintiffs' reputations were thereby damaged.

INSTRUCTION NO. D

If you find the issues in favor of plaintiffs, then you must award plaintiffs such sum as you believe will fairly and justly compensate plaintiffs for any damages you believe they sustained and are reasonably certain to sustain in the future as a direct result of the publishing of the false credit report and/or false credit bulletins stating the plaintiffs had filed for bankruptcy as mentioned in the evidence.

If you find the issues in favor of plaintiffs, and if you believe that defendant published the false credit report and/or false credit bulletins with knowledge that it was false or with reckless disregard for whether it was true, then in addition to any damages to which you find plaintiffs entitled under the foregoing paragraph, you may award plaintiffs an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter it and others from like conduct.

The trial court found that respondent was entitled to a qualified privilege. If the qualified privilege applies, the plaintiff must then prove that the statement was made "with knowledge that it was false, or with reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true." MAI 23.06(2). Appellants' instructions did not conform to MAI 23.06(2) and the trial court refused instructions B, C, and D.

II

Appellants claim the trial court erred in refusing to instruct the jury on the credit report without submitting the defense of

qualified privilege. Appellants claim that current Missouri Approved Instructions incorporate federal constitutional principles which no longer apply in a libel case in which a private plaintiff sues non-media defendant regarding a matter of private concern. Appellants also argue that the qualified privilege should be abrogated because the proving of malice is too confusing and onerous.

> A communication is held to be qualifiedly privileged when it is made in good faith upon any subject-matter in which the person making the communication has an interest or in reference to which he has a duty, and to a person having a corresponding interest or duty, although it contains matter which, without such occasion and under such circumstances, although the matter communicated is defamatory and false, the law will not infer malice, but the existence thereof must be shown by some evidence beyond the falsity of the statements communicated. * * *

Estes v. Lawton-Byrne-Bruner Insurance Agency Co., 437 S.W.2d 685, 690 (Mo. App. 1969) (citations omitted). A qualified privilege has been applied to credit reporting agencies, or mercantile agencies, if the agency communication is made to a subscriber having an interest in the financial position of that business or individual. *Mitchell v. Bradstreet Co.*, 22 S.W. 358, 360 (Mo. 1893); *Minter v. Bradstreet Co.*, 73 S.W. 668 (Mo. 1903); Annotation, *Libel and the Slander Report of a Mercantile Agency as Privileged,* 30 A.L.R.2d 776 (1953); Smith, *Conditional Privilege for Mercantile Agencies,* 14 Colum. L. Rev. 187 (1914). At common law, to overcome the qualified privilege the plaintiff had to prove malice-in-fact "that is, that the defendant was actuated by ill-will in what he did and said with a design to causelessly or wantonly injure the plaintiff." M. Newell, Slander and Libel, § 277 (4th ed. 1924). In *Minter,* this Court stated that a plaintiff had to prove malice, which meant "that the report in question was prepared and published, not in good faith, but with an intent to injure plaintiffs, or with a

willful and wanton neglect of the rights and interest of the plaintiffs." *Minter*, 73 S.W. at 676, 683. Merely proving negligence does not satisfy the malice requirement because negligence does not constitute willfullness, reckless disregard of others' rights or actual presence of an improper motive to injure. *Estes*, 437 S.W.2d at 693.

The Missouri Supreme Court Committee on Jury Instructions incorporated this definition of malice in MAI 23.06 (1964) which required paragraph Fourth to be used if the qualified privilege was raised "that such statement was [written][printed]knowing it to be false] or [without knowing whether it was true or false in reckless disregard for the plaintiffs rights], and with the intent to damage the plaintiff." Current Missouri approved jury instructions require that in a libel case, if the court determines that a qualified privilege applies, MAI 23.06(2) must be used. MAI 23.06(2) instructs the jury that a plaintiff must prove that the defendant published the statement "with the knowledge that it was false, or with reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true." Appellants claim this instruction incorporates federal constitutional principles that are no longer applicable in this case. Appellants rely on *Dun & Bradstreet, Inc. v. Greenmos Builders, Inc.*, 472 U.S. 749 (1985).

In *Greenmoss*, the plaintiff sued a credit reporting agency for incorrectly reporting that plaintiff filed for bankruptcy and other gross misrepresentations of financial information. *Greenmoss*, 472 U.S. at 751. The report was sent to five subscribers who were required to keep the information confidential. *Id.* Vermont law, applicable in *Greenmoss*, did not have a qualified privilege for credit reporting agencies. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 419 (Vt. 1983). The trial court ordered a new trial because the instructions did not satisfy the standard set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The issue before the Court was whether

Greenmoss had to prove malice to recover presumed and punitive damages when the subject matter of the communication was of a private concern. The jury found for the plaintiff and awarded presumed and punitive damages, without finding malice. *Id.* at 752. The opinion by Justice Powell stated "that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the statements do not involve matters of public concern." *Id.* at 763. The *Greenmoss* decision does not mandate that we abrogate the qualified privilege for credit reporting agencies.

Using MAI 23.06(2) does not necessarily mean that appellants' burden of proof was based on constitutional principles. In *Snodgrass v. Headco Industries, Inc.*, 640 S.W.2d 147 (Mo. App. 1982), the court was confronted with a similar argument. The defendant in a slander suit complained that MAI 23.10(2) (an instruction similar to MAI 23.06(2)) utilized language from *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), which the defendant claimed was improper definition for actual malice. *Id.* at 154. The court noted that there was considerable confusion over the proper terminology regarding the type of malice necessary to overcome a qualified privilege, but concluded that:

> The drafters of the MAI were undoubtedly aware of the vast confusion surrounding the many terms used to describe different degrees of malice, and thus the MAI used only one term "malice", and has but one definition for the term in MAI 16.01 *i.e.* "the doing of a wrongful act intentionally without jsut cause or excuse." MAI 23.10(2) does not use the *New York Times* term "actual malice", even though it uses the Court's language defining that term. Thus, any confusion arising from the use of the term in other contexts was avoided. If this court were to adopt defendant's position, that confusion would be multipled rather than avoided. The care taken by the Supreme Court

> Committee on Jury Instructions is evident from the comprehensiveness of the instructions on libel and slander. . . .
>
> The MAI provisions are consistent, well drafted, and in line with the federal and state law concerning both qualified privilege and punitive damages.

Id. The uniform instructions were drafted to end the confusion.

This Court has continued to recognize a qualified privilege for oral statements made to a lender regarding an employee. *Carter v. Willert Home Products, Inc.*, 714 S.W.2d 506 (Mo. banc 1986). We believe that credit reporting agencies are entitled to a qualified privilege to assure that they can continue the rapid flow of credit information required by today's demanding economy.

III

Appellants next claim that if either offered instructions B or C was given, appellants would be entitled to motion for directed verdict, or in the alternative, if the qualified privilege existed, they still would have been entitled to a motion for a directed verdict. In a defamation case, Art. 1, § 8 of the Missouri Constitution prohibits a directed verdict in favor of a plaintiff. *Cf. Lupkey v. Weldon*, 419 S.W.2d 91 (Mo. banc 1967).

The trial court did not err in refusing to give tendered instructions B, C and D.

The judgment of the trial court is affirmed.

Warren D. Welliver, Judge

Billings, C.J., Blackmar,
Robertson and Higgins, JJ.,
concur; Rendlen, J., dissents;
Donnelly, J., dissents in
separate opinion filed.

SUPREME COURT OF MISSOURI
EN BANC

No. 69559

David McDowell, et al.,
Appellants,

vs.

Credit Bureaus of Southeast Missouri, Inc.,
Respondent.

DISSENTING OPINION

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court sought to constitutionalize the law of defamation in the States. It held that a public official may not recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S., at 279-280.

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) and *Associated Press v. Walker*, 388 U.S. 130 (1967), the Court extended the actual malice standard to include "public figures."

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court reaffirmed the actual malice standard for public officials and public figures but held that for private figures the States could establish their own standards of liability for defamation so long as fault is an essential element and so long as recovery of presumed or punitive damages is not permitted absent proof of actual malice.

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985), an opinion by Justice Powell stated "that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not

violate the First Amendment when the defamatory statements do not involve matters of public concern." Rehnquist and O'Connor, JJ., concurred. Burger, C.J., and White, J., concurred in the judgment. Brennan, Marshall, Blackmun and Stevens, JJ., dissented.

In such confusing circumstance[1], I would turn to the Constitution of Missouri which provides "that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for abuses of that liberty * * *." Mo. Const. art. I, § 8; *see* Mo. Const. art. XIIi, § 16 (1820).

In constructing a Missouri constitutional model, I am reminded that "freedom of speech is guaranteed to the individual and newspaper by the Constitution. Courts are charged with the duty they may not pretermit, to see to it that it is not abridged. It is, however, the use, and not the abuse of free speech and free press that is guarded by the fundamental law as sacred." *Diener v. Star-Chronicle Publishing Company*, 230 Mo. 613, 629, 132 S.W. 1143, 1148 (banc 1910).

In 1927, Justice Brandeis expressed the view that "[p]rohibition of free speech and assembly is a measure so stringent that it

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[1] Beginning in the years of Chief Justice Warren, the Court has sought, with unblinking support from academia and the media, to direct social policy in America. Its majority has forgotten that the genius of our constitutional system lies in its basic reliance on the concept of democracy and the diversity of input it provides.

The Court plays a necessary role when it protects "discrete and insular minorities." United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).

But, as with *New York Times*, other Court attempts at nationalization must invariably fail because they violate the itegrity of process implanted in our Constitution. *See* A. Bickel, *The Morality of Consent* 120-21 (1975). Such integrity of process derives, of course, from the fundamental concept that the people, not the Court, are sovereign.

would be inappropriate as the means for averting a relatively trivial harm to society." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). I agree. In similar vein, I believe that a model for the tort of defamation which *excessively* inhibits free expression by threat of penalty is a form of prior restraint on the right to communicate and is prohibited by our Constitution.

Given the intense concern for freedom of expression articulated in our Constitution, I believe that a "defendant who has abused the right of free expression by defamatory statements may be held responsible only to the extent of permitting the injured party to recover for the resulting injury to reputation—that is, to recover compensatory damages." *Wheeler v. Green*, 286 Or. 99, 593 P.2d 777, 788 (1979). I believe "that the possibility of excessive and unbridled jury verdicts, grounded on punitive assessments, may impermissibly chill the exercise of * * * [the right to speak freely] by promoting apprehensive self-censorship." *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 498, 330 N.E.2d 161, 169 (1975).[2]

Accordingly, I would hold:

First, one who publishes a false and defamatory communication concerning a public or private person or figure in regard to matters of public or private concern is subject to liability for defamation, if, but only if, he

(a) knows that the statement is false and that it defames the other person, or

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[2] *See* Anderson, *Reputation, Compensation and Proof*, 25 Wm. & Mary L. Rev. 747, 749 (1984); Van Alstyne, *First Amendment Limitations on Recovery from the Press—An Extended Comment on "The Anderson Solution,"* 25 Wm. & Mary L. Rev. 793 (1984); Franklin, *A Critique of Libel Law*, 18 U.S.F.L. Rev. 1 (1983-84).

(b) acts in reckless disregard of these matters. *See* Restatement (Second) of Torts § 580A, at 214 (1977); MA13d 23.06(2).

Second, punitive damages may not be assessed in cases involving the tort of defamation.

I respectfully dissent.

Robert T. Donnelly, Judge

IN THE CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI

Case No. CV684-889CC

David McDowell and Donna McDowell,
Plaintiffs,

vs.

Credit Bureaus of Southeast Missouri, Inc.,
a corporation,
Defendant.

SECOND AMENDED PETITION

COUNT I

(FCRA Violation)

Come now the plaintiffs, David McDowell and Donna McDowell, by and through their attorneys, Waldron and Walter, and for their complaint in Court I hereof state as follows:

1. This is an action for damages against defendant, Credit Bureaus of Southeast Missouri, Inc., a consumer reporting agency, brought pursuant to the Fair Credit Reporting Act, 15 U.S.C., Section 1681(p).

2. Plaintiffs are residents of Cape Giradeau County, Missouri.

3. Defendant is a corporation, incorporated in the State of Missouri, with its principal offices located in Cape Girardeau County, Missouri.

4. Plaintiffs are and have been for many years engaged in a construction business, building houses and developing subdivisions. Plaintiffs depend upon their financial and credit reputation in order to sell and build houses.

5. Plaintiffs were, on or about April 6, 1982, in the process of selling some real estate including a house thereon to a third party named Gilmore. The sale of this real estate was to be financed through Colonial Federal Savings & Loan Association in Cape Girardeau, Missouri. As a result thereof, Colonial Federal requested a credit report on David McDowell and Donna McDowell in order to proceed with the sale of the real estate.

6. That on April 6, 1982, the defendant and its employees prepared and mailed a credit report on David McDowell and Donna McDowell to Colonial Federal Savings and Loan Association.

7. On April 7, 1982, Colonial Federal Savings and Loan Association received the above mentioned credit report on David and Donna McDowell. The said report contained information showing that David McDowell and Donna McDowell had taken Bankruptcy on or about March 3, 1982.

8. That the aforementined report containing the information that David McDowell and Donna McDowell had taken Bankruptcy was totally false and inaccurate in that neither of the plaintiffs had ever taken Bankruptcy.

9. Because of the false information concerning the Bankruptcy, Colonial Federal Savings and Loan Association refused to close the loan to Gilmore which would have resulted in the sale of plaintiffs' property until such time as the credit report was corrected.

10. Thereafter, on or about April 7, 1982, Kenneth Hayden, a loan officer at Colonial Federal Savings and Loan Association, called the defendant on two occasions to have defendant investigate and/or correct their report concerning the allegation of Bankruptcy.

11. In response to loan officer, Kenneth Hayden's inquiries, the Defendant confirmed its report as factual and refused to alter the report so as to indicate that no Bankruptcy had been filed.

12. The false and inaccurate credit report remained on file and was made accessible to Defendant's customers in this inaccurate, false and uncorrected state.

13. On or about April 13, 1982, plaintiffs had their attorney at that time, John Lichtenegger, write the defendant concerning the falsity and inaccuracy of their April 6, 1982, credit report.

14. Thereafter, on or about April 15, 1982, the defendant prepared and delivered to Colonial Federal Savings & Loan Association an alleged corrected credit report removing the allegations of joint Bankruptcy as had been contained in their April 6, 1982, report.

15. Defendant was negligent in failing to follow the reasonable procedures to assure the maximum possible accurance to obtaining, maintaining and transmitting information concerning plaintiffs in defendant's file. More specifically, defendant did not follow any reasonable procedures to insure the accuracy of their April 6, 1982, report, a copy of which is attached hereto, marked Exhibit A and incorporated herein the same as though fully set out at length herein.

16. As a direct result of defendant's failure to maintain and utilize reasonable procedures to insure the accuracy of information concerning plaintiffs in defendant's file, a credit report as hereinbefore described was issued and disseminated to the public at large and selectively, and said report caused plaintiffs to suffer damage to their business and personal reputation so as to cause them loss of benefit of public confidence and business relationships; loss of credit; loss of business and to cause plaintiffs to suffer humiliation; embarrassment and mental distress and anguish.

17. Plaintiffs were required to hire and pay attorneys to represent them in this matter.

WHEREFORE, plaintiffs pray for judgment against the defendant in the sum of Five Hundred Thousand Dollars

($500,000.00), as and for actual damages, for a reasonable attorney's fee pursuant to applicable Federal Law; for their costs herein expended, and for such other and further relief as to this court shall seem just and proper.

COUNT II

(FCRA Violation - Punitive Damages)

Come now plaintiffs, David McDowell and Donna McDowell, by and through their attorneys, Waldron and Walter, and for Count II of their cause of action, state as follows:

1. Plaintiffs reallege, restate, and incorporate by reference the allegations contained in paragraphs 1 through 14, 16 and 17 of Count I of this First Amended Petition as though fully set out at length herein.

2. Defendant willfully failed to follow and/or maintain reasonable procedures to assure the maximum possible accuracy in collecting, maintaining and transmitting information concerning plaintiffs' credit worthiness in defendant's file.

3. Defendant fabricated the report of bankruptcy of David McDowell, as no person, corporation or business ever reported to the Defendant that David McDowell had filed bankruptcy.

4. Defendant did not have or willfully did not follow any reasonable procedures to insure the accuracy of their April 6, 1982, credit report concerning plaintiffs, a copy of which is attached hereto, marked Exhibit A and incorporated herein the same as though fully set out at length herein.

5. Defendants willfully failed to follow reasonable procedures to correct the inaccurate report after being notified by Colonial Federal Loan Officer, Kenneth Hayden, and allowed the report to remain inaccurate, false, and uncorrected.

6. As a result of defendant's willful failure to follow reasonable procedures to insure the accuracy of collecting, maintaining and transmitting information concerning plaintiffs' credit worthiness as maintained in defendant's file, a false and inaccurate credit report was issued and disseminated to the public at large, causing plaintiffs to suffer loss of credit, loss of business and damage to their personal and business reputations and thus a loss of benefit of public confidence; causing plaintiffs to suffer embarrassment and mental anguish and distress and causing plaintiffs to expend monies for attorney's fees in order to protect their interests.

7. That defendant's acts and/or omissions as aforesaid were willful, wanton and malicious and were done with knowledge that said information was false and with a reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true, and entitle plaintiffs to punitive or exemplary damages.

WHEREFORE, plaintiffs pray for judgment against the defendant in the sum of Five Hundred Thousand Dollars ($500,000.00), as and for actual damages; for punitive damages in the sum of One Million Dollars ($1,000,000.00); for a reasonable attorney's fee pursuant to applicable Federal Law; for their costs herein expended; and for such other and further relief as to this court shall seem just and proper.

COUNT III

(Defamation - Libel)

Come now plaintiffs, by and through their attorneys, Waldron and Walter, and for Count III of their cause of action, state as follows:

1. Plaintiffs reallege, restate and incorporate by reference the allegations contained in paragraphs 1 through 14 and 16 of Count I of this First Amended Petition the same as though fully set out at length herein.

2. Defendant through its agents, servants and/or employees, published a written credit report stating that plaintiffs, David McDowell and Donna McDowell, were bankrupt and they had jointly filed for bankruptcy, which report is identified as plaintiffs' Exhibit A attached hereto.

3. Defendant was at fault in publishing such false statements in that said statement was published with reckless disregard for whether it was true or false at a time when the defendant had no basis or information from which to base the report.

4. That such written statement tended to deprive the plaintiffs of the benefit of public confidence and business and social relationships.

5. That such false statement was read by diverse individuals and became widely circulated in Cape Girardeau County and surrounding counties and areas and plaintiffs suffered humiliation, were the subject of jokes, and as a result, plaintiffs further suffered embarrassment; a loss of credit; a loss of business and mental anguish and distress as a direct result of the publishing of the false statement.

6. Plaintiffs' reputation, both personal and business reputation, was thereby damaged.

7. That defendant's acts and/or omissions as aforesaid, were willful, wanton and malicious and were done with knowledge that said information was false or with a reckless disregard for whether it was true or false at a time when defendant had serious doubts as to whether it was true and entitle plaintiffs to punitive or exemplary damages.

WHEREFORE, plaintiffs pray judgment against the defendant in the sum of Five Hundred Thousand Dollars ($500,000.00); for punitive damages in the sum of One Million Dollars ($1,000,000.00); for reasonable attorney's fees; and for their costs herein expended and such other and further relief as to the Court shall seem just and proper.

COUNT IV

(Defamation - Slander)

Come now the plaintiffs, David McDowell and Donna McDowell, by and through their attorneys, Waldron and Walter, and for Count IV of their cause of action state as follows:

1. Plaintiffs reallege, restate, and incorporate by reference the allegations contained in paragraphs 1 through 14 and 16 of Count I of this First Amended Petition the same as though fully set out at length herein.

2. Defendant, through its agents, servants and/or employees, published a false credit report stating that plaintiffs, David McDowell and Donna McDowell, were bankrupt and they had filed for bankruptcy.

3. The statement contained in the credit report stating that plaintiffs, David McDowell and Donna mcDowell, were bankrupt and that they had filed for bankruptcy, was false and said statement was published with the reckless disregard for whether it was true or false at a time when the defendant had no basis or information from which to base the report.

4. Such false statement was read, repeated and heard by diverse individuals other than plaintiff or defendant and resultantly such false statement became widely circulated in the County of Cape Girardeau, Missouri, and plaintiffs suffered humiliation, were the subject of jokes, and as a result, plaintiffs further suffered embarrassment, loss of credit, a loss of business and mental distress as a result of the statement and publication of said false statements.

5. The circulation and dissemination of the false statement throughout the community of Cape Girardeau County and surrounding counties was done without waiver by the plaintiffs or through privilege on behalf of the defendant.

6. That such false statement depicting plaintiffs as bankrupts is highly offensive to a reasonable person and is offensive to plaintiffs herein.

7. Defendant, in making and publishing the said false statement that plaintiffs were bankrupt, had knowledge of or acted in reckless disregard as to the falsity of the publicized false statement and the false light in which the plaintiffs would be placed.

8. Plaintiffs' reputation, both personal and business reputations, have been thereby damaged.

9. That defendant's acts and/or omissions as aforesaid, were willful, wanton and malicious and were done with knowledge that said information was false or with a reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true and entitle plaintiffs to punitive or exemplary damages.

WHEREFORE, plaintiffs pray judgment against defendant in the sum of Five Hundred Thousand Dollars ($500,000.00); for punitive damages in the sum of One Million Dollars ($1,000,000.00); for a reasonable attorney's fee, for their costs herein expended; and for such other relief as to this court shall deem just and proper.

WALDRON AND WALTER

/s/ Kenneth L. Waldron ÷ 19385
417 N. High, P.O. Box 270
Jackson, MO 63755
(314) 243-8111

Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI

Case No. CV684-889CC

David McDowell and Donna McDowell,
Plaintiffs,

vs.

Credit Bureaus of Southeast Missouri, Inc.,
a corporation,
Defendant.

MOTION AND REQUEST DURING TRIAL

Comes now the plaintiffs by and through their undersigned attorneys and urgently move the court as follows:

1. **CLSOING ARGUMENT.** To allow counsel for the plaintiffs ample time to prepare and deliver both portions of the closing argument to the jury. As grounds therefore, plaintiffs state that:

A. The case is complex, detailed, involved many witnesses and many days of trial, and,

B. The case was adjourned for a period of three (3) full days prior to plaintiffs resting their case, and,

C. Plaintiffs' attorneys do not possess technical degrees and there are technical aspects of the case that need to be carefully dealt with and explained, and,

D. Plaintiffs' attorneys have spent countless hours on this case in the several years since April, 1982 and require a substantial amount of time in argument, to effectively represent their clients in this particular case, and to be able to be effective advocates for those clients. Much of this closing has already been prepared and condensed, but is still lengthy.

WHEREFORE, plaintiffs request, at a minimum, a reasonable time to collect their final thoughts to prepare for closing and for a *minimum* of forty-five (45) minutes to open and forty-five (45) minutes to close, for a total *minimum* time of ninety (90) minutes and that the same be extended liberally in the event of objections and court rulings.

2. **JURY INSTRUCTIONS IN ACCORDANCE WITH DUN & BRADSTREET, INC. V. GREENMOSS BUILDERS, INC.**, ____ Law Week ____, ____ U.S. ____, 1985. Plaintiffs state that this landmark case decided earlier this year by the highest court in the land, is exactly on point to the case at bar. The matter has been briefed in the Trial Brief of the plaintiffs filed in this case. The Missouri Approved Instruction (MAI) book is simply out of date for this case when, as here, we have involved a private or non-public person, for a non-public purpose and relating to that person's private person, reputation and affairs. The *Gertz* case cited in the MAI book and used to prepare certain instructions in this general area, are out of date and terribly incorrect. The effect is to place upon plaintiffs numerous burdens that are not required of them after the *Greenmoss* decision.

WHEREFORE, plaintiffs request instructions in accordance with the *Greenmoss* case and without regard to a submission by the defendant of any type of alleged qualified privilege, when the publication was *totally false* in the first instance. Simply put, this defendant never had and does not now have any type of qualified privilege to publish *totally false* statements about these plaintiffs' reputation to the audience that received same.

Respectfully submitted,

WALDRON AND WALTER

/s/ Kenneth L. Waldron #19385
417 North High, P.O. Box 270
Jackson, MO 63755
(314) 243-8111

Attorneys for Plaintiffs

The instructions tendered are set forth as follows:

INSTRUCTION NO. B

Your verdict must be for plaintiffs if you believe:

First, defendant published a credit report containing the statement that plaintiffs had jointly filed bankruptcy, and

Second, such statement tended to deprive the plaintiffs of the benefit of public confidence and social associations, and

Third, such statement was read by Ken Hayden and also heard by other creditors, suppliers, business associates and acquaintances of plaintiff's, and

Fourth, plaintiffs' reputations were thereby damaged.

INSTRUCTION NO. C

Your verdict must be for plaintiff if you believe:

First, defendant published a credit report and/or credit bulletins containing the statement plaintiffs were bankrupt, and

Second, defendant was at fault in publishing such statement, and

Third, such statement tended to deprive the plaintiff of the benefit of public confidence and social associations, and

Fourth, such statement was read by members of the public, and

Fifth, plaintiffs' reputations were thereby damaged.

INSTRUCTION NO. D

If you find that the issues in favor of plaintiffs, then you must award plaintiffs such sum as you believe will fairly and justly compensate plaintiffs for any damages you believe they sustained and are reasonably certain to sustain

in the future as a direct result of the publishing of the false credit report and/or false credit bulletins stating the plaintiffs had filed for bankruptcy as mentioned in the evidence.

If you find the issues in favor of plaintiffs, and if you believe that defendant published the false credit report and/or false credit bulletins with knowledge that it was false or with reckless disregard for whether it was true, then in addition to any damages to which you find plaintiffs entitled under the foregoing paragraph, you may award plaintiffs an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter it and others from like conduct.

§ 1681e. Compliance procedures

(a) Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

(Pub.L. 90-321, Title VI, § 607, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1130.)

§ 1681n. Civil liability for willful noncompliance

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(Pub.L. 90-321, Title VI, § 616, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.)

§ 1681o. Civil liability for negligent noncompliance

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorneys fees as determined by the court.

(Pub.L. 90-321, Title VI, § 617 as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134.)

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or

which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * *

[980] MR. REMLEY: Very Well, sir. Satisfactory with the defendant.

THE COURT: Is that all right with you, Mr. Waldron?

MR. WALDRON: Yes, sir, Judge.

THE COURT: Okay. Let's go off the record and talk about the instructions.

(Discussion was had off the record, after which the following proceedings were had out of the presence and hearing of the jury:)

THE COURT: Although this is out of the usual order, we're going to discuss our instructions at this time. Is it a fair statement that all instructions numbered 1 through 7, plus the verdict forms, were submitted by plaintiff, Mr. Walter?

MR. WALTER: Yes.

THE COURT: No instructions were submitted by the defendant?

MR. REMLEY: No, Your Honor, there were not.

THE COURT: At this time, you may submit any other instructions you want to submit.

MR. REMLEY: Your Honor, may I at some pint object to the instructions?

THE COURT: Yes. Let me ask the plaintiff first what other instructions they want to submit.

MR. WALTER: We would request the Court to instruct **[981]** the jury on a burden of proof patterned after MAI 3.01.

THE COURT: That instruction will be marked Instruction A and will be refused. Do you want to give Mr. REmley a copy of that so he can have that for his file?

MR. WALTER: We will produce that for him.

MR. REMLEY: That will be fine, Your Honor.

THE COURT: This was really a modified 3.01 that you have handed to me.

MR. WALTER: It says "modified," but I don't believe it was.

THE COURT: What's your next instruction?

MR. WALTER: Your Honor, then we must address the verdict director. We would then tender 23.06(1).

THE COURT: 23.06(1)?

MR. WALTER: Right.

THE COURT: This is the one that simply talks about credit report and is in general form as the one given by the Court?

MR. WALTER: Right.

THE COURT: I'll tell you, I told you last night and I'm going to repeat for the record now, I'll give your credit report instruction, but if I do, the defendant will have a qualified privilege.

MR. WALTER: Yes.

THE COURT: I'll give you your choice.

[982] MR. WALTER: Your Honor, we would request that the Court submit the credit report instruction without qualified privilege, for we feel the qualified privilege is not applicable.

THE COURT: I have some question as to the legal status of the qualified privilege when it pertains to a private individual, in view of the Dun & Bradstreet case; but, as I told you last night, factually, I'm not sure and I don't find the qualified privilege applies particularly to the credit reports.

MR. REMLEY: You mean bulletins?

THE COURT: Correction, credit bulletins as opposed to the reports. As I read the cases, the Estes vs. Lawton-Byrne-Bruner case, and as I read Prosser and the others, I don't find that the privilege applies because I don't think — I just thought of something. Let's go off the record.

(Discussion was held off the record)

THE COURT: Factually, I simply find that the qualified privilege does not apply to the bulletins. It may apply to the report, because I'm not sure she had probable cause to believe, simply based on that last name, first name, zip code, that this was the correct Donna McDowell. And I think I have cited to you, Mr. Remley, the situation where if you represented a criminal defendant who was arrested just simply on last name, first name, you would complain and say there was no probable cause.

[983] And, in addition, if you arrested a man's sister along with him, there certainly wasn't probable cause there. I'm starting to second-guess myself, because maybe we ought to have the instruction, which you don't have and which was not offered, but the instruction that said credit reports or bulletins.

But I'll refuse your Instruction B.

MR. WALTER: Your Honor —

THE COURT: Yes?

MR. WALTER: For the record, then, we would also submit and would be willing to submit — let's mark this Instruction C, which contains the language "credit report and/or credit bulletins."

We would also wish, if the Court saw fit, to modify that to read "or credit bulletins," or "credit report and credit bulletins."

MR. REMLEY: Your Honor, if I may, Prosser clearly indicates, and that merely because there has been or is an incidental publication of a qualifiedly privileged publication does not cause that communication to lose the privilege.

Now, in this case, it was certainly privileged whtn uttered and sent to Colonial Federal Savings & Loan Association.

THE COURT: Let me stop you right there. That's where I got my problem. I understand your system, but—you and I have differences about how we view this, but, to me, just **[984]** taking, when it's so important, when it's so devastating to a man's reputation, simply taking a last name and a first name and a zip code, to me, is just not reasonable. It just doesn't give —

MR. REMLEY: Sir, are you talking about the preparation of the bulletins or the reports?

THE COURT: I'm talking about the mistake the girl made when she simply had — when all the informationshe had was a last name and a first name.

MR. REMLEY: Your Honor, if I may, the evidence that has come in as to the preparation of the bulletins is that that information never comes through the computer.

THE COURT: That's why I'm — I don't know whether we're arguing about the same thing. That's why I'm second-guessing myself and saying maybe I ought to submit to the jury the question of the credit report, because I think the preparation of the credit report, albeit to someone who has a corresponding interest as we have discussed the definition in the Estes case, I think the Estes cases says you've got to have some reasonable ground or reasonable belief, and I think that when the potential impact on a person is so great, I'm not sure that you shouldn't have to have something more than just last name, first name, zip code, particularly in a county like Cape Girardeau County where you got so many McDowells, you got so many Seabaughs, you got so many Hutsons, that sort **[985]** of thing.

MR. REMLEY: I understand that, Your Honor. Going with the fundamental premise that the communicaiton was privileged, that is the report of 4-6-82 was privileged when it got sent to Colonial Federal, that is a law question. And, as I understand it, you have determined that there is a qualified privilege for that.

If you're going to go the next step —

THE COURT: No. Originally, I said — originally, I wrote down, and you can see it on my pad up there, originally, I said I have some question about whether legally there is a qualified privilege any more, period.

MR. REMLEY: Well, I understand that, sir.

THE COURT: In view of the Supreme Court decision in that Vermont case.

MR. REMLEY: Well, Your Honor, under the law in its present state in Missouri, although it may be old law, it is still good law, that the qualified privilege is alive and kicking. And if you go that step to say that there is a qualified privilege for that credit report of 4-6-82, then you must modify the instruction and include another paragraph to that instruction in accordance with the Estes case.

THE COURT: You're correct.

MR. REMLEY: That that then becomes a question of fact.

[986] THE COURT: If, legally, there is still a qualified privilege in the State of Missouri, and if I do not find legally that it — I don't want to use a double negative. Let me just put it in the singular. If I find that it is not legally submissible, then I wouldn't have to modify it and require the plaintiffs to show malice.

MR. REMLEY: That is correct, Your Honor. And in order to do that, you've got to abandon the existing laws that exist in the State of Missouri.

THE COURT: Well, I'm not sure —

MR. REMLEY: The cases are plain that for a mercantile credit institution such as the credit bureau, as to a publication to which there is a mutual interest, both to reciepient and publisher, there is a qualified privilege. And to get away from that, you're going to have to go into the nether world on this Green-Moss and whether or not, yet, by its talking about Vermont law, where they have never had a qualified privilege, and ocme in here and sweep away Missouri law with the stroke of a pen. And I don't think the Supreme Court case meets that at all. It simply says it is not unconstitutional to only give this much protection. That is not the same thing as saying this much protection is not appropriate. And Missouri protects more than Vermont does. It lowers the minimum but doesn't change what Missouri does.

THE COURT: Scott —

[987] MR. WALTER: If I can just speak briefly, for the record, what the plaintiffs' position is, this may well go on appeal, Judge, as we have contended all along, we believe the qualified privilege is no longer applicable, either on a constitutional basis or on a common law basis, especially when you're talking about

private interest involved; and, secondly and most importantly, the means of communication, which were not even foresaw by the people who wrote Mentor and the other decisions the defendant is relying on.

Seeing that it is your decision that the qualified privilege may apply in this case, which we take disagreement, and that disagreement is noted, we would speak specifically that—

THE COURT: Well, now, I think both of you know that I'm not talking about nor do I find that the qualfied privilege applies to the bulletin situation.

MR. WALTER: Correct.

THE COURT: I think that's clearly outside the purview of the qualified privilege.

MR. WALTER: Correct. We understand that, Judge.

THE COURT: We're only arguing about the credit report aspect.

MR. WALTER: Well, but also, generally, we don't think it should enter into this discussion, but the fact is it is there because you have placed it there. We would submit **[988]** to the Court, as Mr. Remley cited Prosser, then we would cite him, too, and I quote, on Section 115, page 829, and this is just one sentence: "There is no general agreement, however, that the privilege is limited by the extent to which the particular subscriber to whom the publication is made has an apparent present interest in the report, and that insofar as there is a general publication to those without such an interest, the risk of false information is one to be borne by the business." And, therefore, since the evidence has shown that there has been publication far beyond the offices of Colonial Federal Savings, we would submit that if we submit it to the general public as we have in our verdict director that the qualified privilege would not apply, either to the credit report or to the bulletins, especial-

ly where we have had the testimony of Mr. Ellis that he saw the report in question or, Mr. Remley will recall, one like it.

THE COURT: Well, I think the discussion in the "Notes on Use" of the Committee's Comment on the applicable verdict directors also indicates there is some question about this.

For example, in 23.06(2), it says, "The Missouri courts could continue to apply this standard in such cases. However, they are probably no longer constitutionally required to do so and it would appear to be an open question as to what position the Missouri courts will take now that they are free **[989]** to determine their own position on this issue."

MR. REMLEY: That's my point precisely, sir, and that is that in that context, the fact that the Supreme Court of the United States may lower the minimum level of constitutional protection for commercial speech of this nature does not mean that everybody has to be dragged down to a lower level of protection right along with Vermont. The states are free to select the level of proof and protection and to find their own tort standard, so long as those standards are not less than the constitutional minimum.

MR. WALTER: We would submit that those Committee notes were written before the advent of the Bradstreet and Green-Moss.

MR. REMLEY: Constitutional principles don't change merely because the names of the cases change, Judge.

MR. WALDRON: I think the Court's already correctly ruled on this, and all the time you've spent on this, Judge, your analysis is correct on this. I think we ought to proceed.

THE COURT: Well, the question really is as to the report. of the bulletins, I don't think there's any question about it. I'll deny and refuse Instruction C. If we have some more time and if it's necessary, at the motion for new trial, we can certainly

correct any errors that we make. I don't want to make business for the appellate court, that's why I'm going to try to cut this as clean as I can, be as **[990]** conservative as I can and follow the instructions that the Supreme Court gives us in the approved instructions.

It is a serious question, I'll grant you, both sides. I wish I had an answer for you, but I'm going to refuse the —

What else do you have, sir?

MR. WALTER: Judge, in light of the prior discussion, to cut it short, what we have here, then, is I believe I gave you and you refused this one?

THE COURT: Yes, I've refused C, in either form, whether it says "credit report and credit bulletins" or it says "credit report or credit bulletins."

MR. WALTER: Then we have the issue of burden of proof, and we would submit first a 4.15 to coincide —

THE COURT: Right. In other words, you're saying not only wuld you submit the right verdict director but the proper supporting instructions. I will refuse the 4.15 and mark that D.

MR. WALTER: Then, also, Judge, finally, another 4.15 and accompanying definition, in light of our argument that we think the qualified privilege is completely improper regardless of the credit report or credit bulletins. We would submit that one.

THE COURT: All right. Your definition instruction for malice, malicious, and so forth will be marked E and **[991]** refused.

MR. WALTER: And this is the one where the term "malice" is —

THE COURT: What's the number on that?

THE COURT: That's another 4.15.

THE COURT: That will be marked F and be refused.

MR. REMLEY: I'm sorry; I missed that one.

MR. WALTER: We'll need a copy, Judge.

MR. REMLEY: That's another burden of proof that what?

THE COURT: It's a 4.15. That's really a damage instruction. That would go along with their theory that the qualified privilege doesn't apply to either bulletins or credit reports.

MR. WALTER: I believe that's the same one we have given. Let me just check to be absolutely certain. Well, it's patterned after our position on Green-Moss, so you can just refuse that one and mark it G.

THE COURT: G, this is a 4.15, damage instruction, after the Green-Moss case. I'll mark that G and refuse it. Anything else?

MR. WALTER: No, Your Honor.

THE COURT: All right. Nothing further for the plaintiff? Does the defendant have any further instructions they want to submit?

* * *

(2)

No. 88-112

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

DAVID MCDOWELL and DONNA MCDOWELL,

Petitioners,

vs.

CREDIT BUREAUS OF SOUTHEAST MISSOURI, INC.,

Respondent.

On Appeal from the Missouri Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS DAVID MCDOWELL AND DONNA MCDOWELL'S PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

DOES THIS COURT HAVE CERTIORARI JURISDICTION UNDER 28 USC SECTION 1257 TO CONSIDER WHETHER THE FAIR CREDIT REPORTING ACT, 15 USC SECTION 1681 ET SEQ. HAS PREEMPTED THE MISSOURI COMMON LAW TORT ACTION OF DEFAMATION AGAINST CREDIT REPORTING AGENCIES.

II.

DOES THIS COURT'S DECISION IN DUN AND BRADSTREET VS. GREENMOSS BUILDERS, INC., 472 US 749, 86 L.Ed.2d 593, 105 S.Ct. 2939 (1985) INVALIDATE THE STATE OF MISSOURI'S COMMON LAW QUALIFIED PRIVILEGE FOR CREDIT REPORTING AGENCIES AND THUS REQUIRE THE STATE OF MISSOURI TO REDUCE THE LEVEL OF PROTECTION ITS COMMON LAW PROVIDES THIS TYPE OF SPEECH TO NO MORE THAN THE MINIMUM LEVEL OF CONSTITUTIONAL PROTECTION DEFINED IN DUN AND BRADSTREET VS. GREENMOSS.

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COUNTERSTATEMENT OF THE CASE

This was a jury tried libel action initiated by Petitioners against Respondent, the Petition having been filed on the 31st day of May, 1984.

Petitioners are real estate developers building "spec houses". Respondent is a Missouri corporation, the business of which is the collection, storage and sale of credit information on consumers living in its service area. This information is sold to its subscribers in the form of credit reports on particular individuals upon the specific

request of a subscriber and bi-monthly credit bulletins, which contain public record information. The bulletins are sent to all subscribers who pay for that particular service.

On or about March 26, 1982, Respondent received the March 25, 1982 issue of the St. Louis Daily Record, a legal newspaper, which showed that a Donna R. McDowell, Route 2, Box 298, Jackson Missouri, a seamstress, had filed a Voluntary Petition in Bankruptcy. Because this filing pertained to a resident of Respondent's service area, Respondent's technician, Teena Warf, sought to input that information into the Respondent's computer data base. Ms. Warf ran a search of the then existing credit files and found Petitioner's file, the only computer file for a Donna McDowell living on a rural route in Jackson, Missouri.

On the strength of the matches of surname, first name, rural route, city and zip, the bankruptcy information was posted to Petitioner's file.

Petitioners make much of Respondent's failure to compare the middle names, the marital status, the route numbers, the social security numbers, occupation, sex and credit bureau affiliations in making the match. However, as admitted by Petitioners in the trial and their depositions, and as was made eminently clear to the jury, Ms. Warf did not have all of those pieces of information for both Donna McDowells to use in the comparison. Petitioners continue to attempt to fault Ms. Warf for not comparing and matching information which she did not possess.

In November of 1981, John and Shelby Gilmore entered into a Contract for Deed with Petitioners for the purchase of a house to which Petitioners held title. On April 5, 1982, having heard rumors that Petitioners were in fact bankrupt, the Gilmores filed an application for purchase financing from Colonial Federal Savings and Loan Association, a local mortgage lender. On April 6, 1982, Colonial Federal requested a full credit report on the Gilmores and a "bankruptcy report" on Petitioners to satisfy itself that Petitioners' title was not subject to any bankruptcy estate. On that same day, Respondent caused its computer to generate the credit report of April 6, 1982 which reflected the bankruptcy information posted to that file by Respondent's technician a few days before.

Colonial Federal Savings and Loan, in the person of Amelia Seyer, received the report on or about April 7 or 8, 1982, and directed her supervisor's attention to the bankruptcy filing. Not believing the report to be correct, the supervisor, Kenneth Hayden, directed Ms. Seyer to contact Respondent to confirm the information in the report. Ms. Seyer telephoned Respondent that very day and Ms. Warf began to back check to determine whether an error had been committed. She discovered that same day that the credit report was in fact in error and immediately telephoned Ms. Seyer to advise her that Petitioners were not in bankruptcy. Thus, Colonial Federal Savings and Loan Association, the only entity to which this report was published, was almost immediately advised of its inaccuracy. A corrected written report was mailed to Colonial Federal on April 14, 1982.

Contrary to Petitioners' statement, the Gilmore loan transaction closed on time.

In addition the factual inaccuracies contained in Petitioners' Statement of the Case pointed out above, Petitioners also assert, on Page 3, that Respondent "compounded the error" in "widely" disseminating the bankruptcy reporting in the credit bulletin. This assertion is badly and glaringly false.

Firstly, the bulletins do not use any information from the computer, but rather, are prepared directly from the information source. In this case, the issue of the St. Louis Daily Record containing the report of the bankruptcy filing was in Ms. Warf's possession while she was responding to Colonial Federal's request for verification while the bulletin was being prepared. Thus, the information was not available to the bulletin preparer and was not put into it.

Secondly, the bulletin for the appropriate time period was admitted into evidence at trial. The bulletin showed a three bankruptcy case number gap, those identical case numbers being those contained in the March 25, 1982 issue of the St. Louis Daily Record. One of those case numbers was for Donna R. McDowell.

Thirdly, and most importantly, Petitioners submitted the case to the jury on the theory that the allegedly libelous information was published in the credit bulletin (App. 1). On this submission, the jury returned a unanimous verdict for Respondent thus finding that Respondent *did not* publish the information in the bulletin (App. 2).

ARGUMENT

Certiorari should not be granted in this case on the bases of either of the Questions Presented as espoused by Petitioners, for the reasons that:

A

This Court lacks jurisdiction to consider the alleged preemptive effect of the Fair Credit Reporting Act 15 USC 1681, as the application of the Fair Credit Reporting Act was not presented to nor ruled upon by the Missouri Supreme Court.

In their Petition for Writ of Certiorari, Petitioners purport to invoke this Court's jurisdiction as created and defined by 28 USC 1257. It is well established that in order for this Court to have jurisdiction to review a State Court judgment by Certiorari, the highest Court of the State must have rendered a final judgment which actually considered and ruled upon a federal question. Absent the raising of and ruling upon the federal question by the State's highest Court, this Court lacks jurisdiction to consider the case. *Illinois vs. Gates*, 462 US 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

> "Moreover, this Court has stated that when, as here, the highest State Court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the State Courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Street vs. New York, 394 US 576, 582, 89 S.Ct. 1354, 1360 (1969)."

Thus, in order to invoke this Court's Certiorari jurisdiction, Petitioners must carry the burden of establishing

that the question of the applicability of the Fair Credit Reporting Act of this cause of action was preserved and presented to the Missouri Supreme Court. Petitioners do not, and in fact, cannot carry that burden.

Petitioners are correct in their claim that they initially pleaded a Fair Credit Reporting Act claim in the trial court. However, that pleading failed to present a viable cause of action because the two year Statute of Limitations prescribed in 15 USC 1681(p) had run (App. 3). The credit report giving rise to this case was prepared on April 6, 1982. Suit was not filed until May 31, 1984 (App. 4-5). Thus, no justiciable Fair Credit Reporting Act cause of action ever existed in this case.

Furthermore, as clearly illustrated in the Missouri Supreme Court opinion and Petitioners' Motion and Request during trial, both of which appear in the Appendix to the Petition for Certiorari now under consideration, the gravamen of Petitioners' complaints and claims of error in the Missouri Courts all revolve around the refusal of Petitioners' tendered jury instructions which sought to avoid the defense of the Missouri Common Law qualified privilege. Conspicious by absence are any references to the Fair Credit Reporting Act. At trial, Petitioners did not tender any instructions purportedly patterned after the Fair Credit Reporting Act, nor does the language of the refused instructions, B, C and D, bear any similarity to the operative words of 15 USC Section 1681(e), 1681(n) or 1681(o) (App. 6-7).

Perhaps the most telling evidence of Petitioners' failure to preserve any issue as to the Fair Credit Reporting

Act are the Points Relied On of their Brief filed with the Missouri Court of Appeals, and resubmitted to the Missouri Supreme Court. (App. 8-9). As with all other materials and sources from which one might discover the issues presented to the Missouri Supreme Court, these Points Relied On are utterly devoid of any reference, direct or indirect, to the Fair Credit Reporting Act.

It is obvious, therefore, that no cause of action based upon the Fair Credit Reporting Act was viable at any time during the life of this case, let alone during the Missouri Supreme Court appellate phase.

In an effort to create jurisdiction where none exists, Pages 4 and 5 of Petitioners' Brief seek to transform the trial instruction conference and the tendered instructions from a discussion of the applicability of the Missouri qualified privilege into a discussion of the Fair Credit Reporting Act. In advancing this argument, Petitioners are attempting to convert an apple into an orange. Even in cold print, the instruction conference clearly conveys the issues being discussed, namely, the viability of Missouri's qualified privilege in light of *Dun and Bradstreet vs. Greenmoss Builders, Inc.*, 472 US 749, 86 L.Ed.2d 593, 105 S.Ct. 2939 (1985).

To confirm that the subject jury instructions were based upon *Dun and Bradstreet*, rather than the Fair Credit Reporting Act, one needs to look no further than Page 11 of Petitioners' own Petition now before this Court, wherein Petitioners state:

> Believing, as did the Missouri Court of Appeals for the Eastern District, that the plurality decision in *Dun*

and Bradstreet determined that a private individual did not need to show "actual malice" in order to recover either actual or punitive damages where the matter reported involved: (a) a commercial speech and (b) a credit report of only private concern, Petitioners below tendered Instructions B, C and D which were refused by the trial court.

There being no final decisions of the Missouri Supreme Court ruling upon the validity or applicability of the Fair Credit Reporting Act, or any other federal question, this Court lacks jurisdiction to consider whether the Fair Credit Reporting Act has preempted the Missouri Common Law tort of libel against a credit reporting agency.

B

This Court's decision on *Dun and Bradstreet vs. Greenmoss Builders, Inc.*, 472 US 749, 86 L.Ed.2d 593, 105 S.Ct. 2939 (1985), holding that such speech is not entitled to substantial First Amendment protection does not require the State of Missouri to reduce the level of protection its common law affords this type of commercial speech.

Respondent submits that Petitioners have misinterpreted *Dun and Bradstreet* by arguing that by finding that this type of speech was entitled to a reduced level of constitutional protection, this Court tacitly directed the Missouri Supreme Court to repudiate its own Common Law qualified privilege for credit reporting agencies. Petitioners' argument is flawed in at least three respects.

Firstly, *Dun and Bradstreet* holds that it is constitutionally permissible to permit the recovery of presumed

and punitive damages in private matter libel cases without the necessity of proving "actual malice", as that term is defined in *New York Times vs. Sullivan*, 376 US 254, 84 S.Ct. 710, 11 L.Ed.2d 666 (1964). This ruling has the practical effect of returning to the pre-*New York Times* law of libel per se, at least for statements which do not involve matters of public concern. *Mitchell vs. Bradstreet*, 22 SW 358, 361 (Mo. 1893); *Estes vs. Antrobus*, 1 MO 197 (1822); Prosser On Torts, 5th Edition, Section 112, 795-796.

In contrast, Missouri's Common Law qualified privilege does not relate to proof of damages, but rather involves a basic element of the tort itself of which Plaintiff bears the burden of proof. *Cook vs. Pulitzer Publishing Company*, 145 SW 480 (Mo. 1912). Since the recognition of the qualified privilege for credit reporting agencies in 1893, in *Mitchell, supra.*, "an action for libel [could not] be founded upon [the communication]" absent proof of publication of the false communication with actual malice.

Mitchell perfectly illustrates, in libel per se cases, the dichotomy between the burden of proving actual malice as an element of the tort and the elimination of the burden of proof on presumed or punitive damages. *Mitchell* fully recognizes and discusses each issue and confirms that they are distinct and separate doctrines. Thus, Petitoners are incorrect in equating the two.

The second flaw in Petitioners' reasoning stems from their erroneous belief that the Missouri Common Law qualified privilege and the constitutional privilege enunciated in *New York Times* are co-extensive doctrines. As established by *Mitchell*, the Common Law qualified privilege predates *New York Times* by over 70 years.

According to Petitioners, Missouri Appellate Courts have misinterpreted *New York Times* and *Gertz* [vs. Robert Welch, Inc., 418 US 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)], and, since 1964, have changed the standard necessary to overcome the qualified privilege from "willful and wanton neglect" to an "actual intent to injure". This contention is clearly incorrect. In fact, at least since 1909, in *Holmes vs. Royal Fraternal Union*, 212 SW 100 (Mo. 1909), the Missouri Supreme Court adopted the standard of an actual conscious desire to injure the Plaintiff. That standard is echoed over seven decades of Missouri authority.[1]

This standard is further expressed in Missouri's original pattern libel instruction (App.10) which requires the addition of the following paragraph when the Court has determined the qualified privilege applies:

> Fourth that such statement was [written] [printed] [knowing it to be false] or [without knowing whether it was true or false and reckless disregard for the Plaintiff's rights] and *with the intent to damage Plaintiff.* (Emphasis added).

The MAI Committee, after *New York Times*, sought to reduce the confusion surrounding the various types of "malice" by adopting the *New York Times* language,

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[1] *Cook, supra.*: "Express malice"; Holmes vs. Royal Fraternal Union, 212 SW 100, 104 (Mo. 1909): "Defendant motivated by personal spite or ill will, express malice"; *Minter, supra.*: "Intent to injure"; Ramacciotti vs. Zinn, 550 SW2d 217, 225 (Mo. App. 1977); Garey vs. Jackson, 193 SW 920, 923 (Mo. App. 1917): "Actuated by motives of personal spite of ill will"; De Van Rose vs. Tholborn, 134 SW 1093, 1094 (Mo. App. 1911): "Malicious motive, feeling of personal ill will, desire to injure".

whether the case involved a "public official" or a "qualified privilege". However, the degree of malice to overcome the qualified privilege remained a mental state characterized by a bad motive. *Snodgrass vs. Headco Industries, Inc.*, 640 SW2d 147 (Mo. App. 1982).

Because the constitutional privilege and the Common Law privilege do not spring from the same soil, a refinement of the constitutional privilege does not necessarily affect the qualified privilege.

The third flaw in Petitioners' analysis is their interpretation of *Dun and Bradstreet* as a directive or mandate to the State of Missouri to reduce the level of protection it has choosen to provide this type of speech to no more than the minimum protection required by the United States Constitution. In making this interpretation Petitioners seek to federalize state libel law.

Clear evidence of the independence of state libel jurisprudence is found in *Grove vs. Dun and Bradstreet, Inc.*, 438 F2d 433 (C.A.3d 1971), cert. den., 404 US 898, 92 S.Ct. 204, 30 L.Ed.2d 175.

Grove was the second appeal from the second trial of a credit report case, the previous trials involving, among other issues, the Pennsylvania Common Law qualified privilege.[2] The Third Circuit Court of Appeals, per Judge

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[2] Altoona Clay Products, Inc. vs. Dun and Bradstreet, Inc., 246 F.Supp. 419 (D.C. Pa. 1965); Altoona Clay Products, Inc. vs. Dun and Bradstreet, Inc., 367 F2d 625 (C.A.3d 1966); Altoona Clay Products, Inc. vs. Dun and Bradstreet, Inc., 286 F.Supp. 899 (D.C. Pa. 1968); Altoona Clay Products, Inc. vs. Dun and Bradstreet, Inc., 308 F.Supp. 1068 (D.C. Pa. 1970).

Aldisert, considered whether the *New York Times* constitutional privilege shielded the Defendant Dun and Bradstreet from liability for its erroneous report. The Court, upon finding that the Plaintiff was not a "public figure", nor did the case involve an "issue of public interest", stated, at 438:

> We hold, therefore, that the doctrine of *New York Times vs. Sullivan* does not extend to private subscription credit reports, and that any allegations of defamation concerning such reports are properly subject to the libel laws of the several states.

It is clear, therefore that the states, including the State of Missouri, are free to define their own libel laws, and are also free to protect certain types of communications, when, in the exercise of their sovereignty, the states find that the legitimate public interests are advanced by providing such protection.

Thus, the Missouri Supreme Court was correct in ruling that Missouri's Common Law qualified privilege for credit reporting agencies was not abrogated by this Court's opinion in *Dun and Bradstreet vs. Greenmoss Builders, Inc.*

CONCLUSION

Because no federal question was preserved and presented to the Missouri Supreme Court for ruling as to the purported preemptive effect of the Fair Credit Reporting Act, and further, because Missouri's Common Law qualified privilege has not been abrogated by any ruling of

this Court, Respondent respectfully requests that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

THOMASSON, DICKERSON, GILBERT & COOK

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APPENDIX

INSTRUCTION NO. 5

Your verdict must be for plaintiff if you believe:

First, Defendant published credit bulletins containing the statement the plaintiffs were bankrupt, and

Second, Defendant was at fault in publishing such statement, and

Third, such statement tended to deprive the plaintiff of the benefit of public confidence and social associations, and

Fourth, such statement was read by members of the public, and

Fifth, Plaintiffs' reputations were thereby damaged.

PREPARED AT COURT'S DIRECTION
TENDERED BY PLAINTIFF DEFENDANT
MAI NO. _____
MAI NO. _____ Modified
MAI NO. _____
GIVEN REFUSED
DATE 11/20/85

MAI NO. 23.06(1)
Submitted by Plaintiff

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiffs David McDowell and Donna McDowell for damages against defendant, Credit Bureaus of Southeast Missouri, Inc., a corporation, we the undersigned jurors, find in favor of:

/s/ Defendant, Credit Bureaus of Southeast MO, Inc.
Plaintiffs David McDowell and Donna McDowell or Defendant Credit Bureaus of Southeast Missouri, Inc.

Note: Complete the following paragraph only if the above finding is in favor of plaintiffs, David McDowell and Donna McDowell.

We, the undersigned jurors, assess the damges of plaintiffs David McDowell and Donna McDowell as follows:

For actual damages $_____(stating the amount)

For punitive damages $_____(stating the amount, or if none, write the word "none".)

Note: All jurors who agree to the above findings must sign below:

/s/ Stephen C. Strong
/s/ Rosemary Logan
/s/ Joyce A. Johnson
/s/ Charles S. McClendon
/s/ Kenneth R. Parsons
/s/ Rebecca J. Ford
/s/ Wanda L. Dickman
/s/ Elaine Priest
/s/ Mary L. Greaser
/s/ Marilyn E. Mayfield
/s/ David G. Heisserer
/s/ Dennis M. Gardner

§ 1681p. Jurisdiction of courts; limitation of actions.

An action to enforce any liability created under this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises, except that where a defendant has materially and willfully misrepresented any information required under this subchapter to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual under this subchapter, the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

(Pub.L. 90-321, Title VI, § 618, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134).

DOCKET SHEET

CAPE GIRARDEAU COUNTY CIRCUIT COURT
CAPE GIRARDEAU COUNTY, MISSOURI

Nature of Action:
Intentional Tort
File No. CV684-889CC

DAVID McDOWELL and DONNA McDOWELL
Plaintiff/Petitioner

vs.

CREDIT BUREAU OF SOUTHEAST MISSOURI, INC.
Defendant/Respondent

Scott E. Walter
Att. for Plaintiff or Petitioner
David Remley
Att. for Defendant or Respondent

DATE	ORDERS OF THE COURT
5-31-84	Petition (Counts I - IV) filed by Plaintiff. /s/ cg
6-1-84	Summons issued and directed to the Sheriff of Cape County for service on defendant. /s/ cg
6-7-84	Sheriff of Cape Girardeau County files return on Summons showing service of Credit Bureau of Southeast Missouri Inc., by leaving a copy of the summons and petition with Bill Berry, Registered Agent, for Corp. on June 4, 1984. /s/ mt
6-14-84	Due to the fact that Judge A. J. Seier is knowledgeable about computers, cause assigned to Judge A. J. Seier.
8-8-84	Answer filed by David M. Remley, attorney for defendant. /s/ cg
10-3-84	Interrogatories filed by David Remley, attorney for defendant. /s/ cg

2-20-85 Motion to Compel Answers to Interrogatories filed by David M. Remley, attorney for defendant. /s/ cg

2-22-85 Motion for Additional Time to Answer Interrogatories filed by Kenneth L. Waldron, attorney for plaintiffs. /s/ cg

2-25-85 Suggestions in Opposition filed by David M. Remley, attorney for defendant. /s/ cg

2-28-85 Memo filed by Hon. A. J. Seier setting matter for pretrial conference and selection of trial date on March 11, 1985 in Jackson. /s/ A.J.S. (Copy of memo mailed to attorneys of record on this date.) /s/ C.P.H.

3-11-85 Memorandum of Judge A. J. Seier filed setting cause for trial in Jackson on April 30, 1985. /s/ cg

3-13-85 Copy of memo dated 3/11/85 sent to attorneys of record. /s/ cg

4-2-85 Memorandum of Judge A. J. Seier filed setting cause for pretrial conference in Cape on April 22, 1985. /s/ cg

4-3-85 Copy of memo dated 4/2/85 sent to attorneys of record. /s/ cg

§ 1681e. Compliance procedures

(a) Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 1681c of this title and to limit the furnishing of consumer reports to the purposes listed under section 1681b of this title. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 1681b of this title.

(b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

(Pub.L. 90-321, Title VI, § 607, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1130).

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§ 1681n. Civil liability for willful noncompliance.

Any consumer reporting agency or user of information which willfully fails to comply with any requirement

imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of–

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(Pub.L. 90-321, Title VI, § 616, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134).

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§ 1681o. Civil liability for negligent noncompliance.

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of–

(1) any actual damages sustained by the consumer as a result of the failure;

(2) In the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(Pub.L. 90-321, Title VI, § 617, as added Pub.L. 91-508, Title VI, § 601, Oct. 26, 1970, 84 Stat. 1134).

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT THEIR VERDICT MUST BE FOR PLAINTIFF IF THEY FOUND THE RESPONDENT AT ITS FAULT PUBLISHED A FALSE CREDIT REPORT STATING THE APPELLANT HAD FILED FOR BANKRUPTCY. THE COURT ERRED BECAUSE IT WOULD ONLY GIVE THE INSTRUCTION ALONG WITH AN INSTRUCTION ADVISING THE JURY THE RESPONDENT WAS ENTITLED TO A QUALIFIED PRIVILEGE WHEN RESPONDENT WAS NOT SO ENTITLED.

Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 105 S.Ct. 2939 (1985)

M.A.I. 23.06 (1)(2)

Mitchell et al. v. Bradstreet Company, 22 SW 358 (1893)

Prosser and Keeton on The Law of Torts, (5th ed. 1984)

Rosenbloom v. Metro Media, Inc., 403 U.S. 323 (1974)

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)

Greenmoss Builders, Inc., v. Dun & Bradstreet, Inc., 143 VT. 66, 461 A.2d 414 (VT 1983)

Connick v. Meyers, 461 U.S. 138 (1083)

Minter v. Bradstreet Company, 174 Mo 444, 73 SW 668 (1903)

Perdue v. Montgomery Ward and Co., 107 SW2d 12, (MO 1937)

Moore v. Credit Information Corporation of America, 673 F2d 208 (C.A. 8th 1982)

False Credit Reports – Sufficiency of Proof, 40 ALR 3d 1049.

Restatement (Second) on Torts.

Libel and Slander: Report of Mercantile Agency as Privileged. 30 ALR 2d 776.

II.

THE COURT ERRED IN FAILING TO DIRECT A VERDICT FOR APPELLANT INSOFAR AS LIABILITY IS CONCERNED AS APPPELLANT SUSTAINED ITS BURDEN OF PROOF WITHOUT DISPUTE IN THE ABSENCE OF ACTUAL MALICE.

Zaggarri v. Nichols, 429 SW2d 758 (MO 1968)

Mitchell et. al. v. Bradstreet Company, 22 SW 358 (1893)

Prosser and Keeton on the Law of Torts, Section 115

23.06 Verdict Directing – Libel

Your verdict may be for plaintiff if you believe:

First, defendant (*describe act such as "wrote a letter"*) containing the statement (*here insert the exact statement claimed to be libelous*), and

Second, such statement tended to expose plaintiff to [hatred] [contempt] [ridicule] [deprive the plaintiff of the benefit of public confidence and social associations],[1] and damaged plaintiff's reputation, and

Third, such statement was read by (*here insert name of person or persons other than plaintiff or the appropriate generic term such as "the public"*).

(If the defense of qualified privilege is raised and the plaintiff claims that the privilege was abused, then paragraph Fourth must also be added.)

Fourth, that such statement was [written] [printed][2] [knowing it to be false] or [without knowing whether it was true or false in reckless disregard for the plaintiff's rights],[3] and with the intent to damage the plaintiff.